

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 17, 2017

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

GVS PROPERTIES, LLC,**Petitioner/Cross Respondent :****-against-****:****Case No.: 15-1305****NATIONAL LABOR RELATIONS BOARD,****:****Respondent, Cross-Petitioner****And****:****INTERNATIONAL ASSOCIATION OF****MACHINISTS AND AEROSPACE****:****WORKERS, AFL-CIO, DISTRICT LODGE 15,****LOCAL LODGE 447****:****Intervenor.**

:**NATIONAL LABOR RELATIONS BOARD,****Cross-Petitioner, :****-against-****: Consolidated Case No.: 15-****1350****GVS PROPERTIES, LLC,****:****Cross-Respondent,****And****:****INTERNATIONAL ASSOCIATION OF****:****MACHINISTS AND AEROSPACE****WORKERS, AFL-CIO, DISTRICT LODGE 15,****:****LOCAL LODGE 447****:****Intervenor**

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**RESPONSE OF PETITIONER/CROSS RESPONDENT TO THE MOTION
OF THE NATIONAL LABOR RELATIONS BOARD SEEKING TO
CANCEL ORAL ARGUMENT AND VACATE THE BOARD'S ORDER AS
MOOT**

STATE OF NEW YORK

}S.S.

COUNTY OF NASSAU

Richard M. Howard, being duly sworn, does hereby depose and say:

Introduction

1. I am a member of the Meltzer, Lippe, Goldstein & Breitstone, LLP law firm.
2. I make this affidavit to explain and set forth the response of the Petitioner/Cross Respondent, GVS Properties, LLC ("GVS") to the motion of the National Labor Relations Board ("NLRB") to cancel oral argument concerning the subject appeal and to vacate the NLRB's underlying decision and order (the subject of this proceeding), issued on August 27, 2015, and reported at 362 NLRB No.:194 (2015), as moot.
3. At the eleventh hour, counsel to the NLRB and counsel to GVS were presented with the Intervenor's disclaimer of interest in the subject bargaining unit. Ironically, only days earlier, the Intervenor filed a motion requesting to share oral argument with the NLRB.
4. In any event, the NLRB no longer has a reasons to enforce its order and would consider this proceeding moot. GVS does not seek to argue whether this proceeding is moot, to wit: whether it meets the exception of being

“capable of repetition, yet evading review.” *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).”

5. In order to meet this exception, it must be shown that:

(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again.” *Cook v. Colgate University*, 992 F.2d at 19 (internal quotation marks omitted); see *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam).

Orce v N.L.R.B., 133 F3d 907 [2d Cir 1997]

6. This Court will determine whether this proceeding is moot. The critical question, however, is how the underlying order is treated should this proceeding be found moot.

7. GVS respectfully requests an order that not only vacates the underlying decision and order of the NLRB, but remands to the NLRB with a direction to dismiss the decision and order, to assure it cannot be used as precedent, in the absence of an opportunity for review.

Background

8. In this matter, GVS has litigated a trial at the NLRB, a Section 10J application of the NLRB that was emphatically denied by Federal Eastern District Court Judge Cogan, post trial briefing, and exceptions to the NLRB,

before assembling a Deferred Appendix and the Record on Appeal and Moving and Reply briefs to this body.

9. The significant expense incurred by GVS should not be ignored.

10. GVS is not the only entity affected by the subject decision and order of the NLRB. Other real estate developers are equally affected.

The Requested Remedy Should This Proceeding Be Found Moot

11. Consequently, if the subject decision and order is vacated, but nothing more is stated, the decision and order could potentially remain as precedent, continuing to have an effect upon GVS and other real estate developers throughout New York City and Westchester County. (Westchester has a similar ordinance to the Displaced Building Service Workers Protection Act in New York City.)

12. GVS would therefore like to assure that if this proceeding is determined to be moot, then the underlying unreviewable order of the NLRB will have no “legal consequences for parties that could not obtain review.” In Re Classic Tel., Inc., 15 FCC Rcd 25101, 25101 [2000]

13. This is in accordance with United States v Munsingwear, Inc., 340 US 36, 39–40, 71 S Ct 104, 106–07, 95 L Ed 36 [1950] in which the Supreme Court stated:

The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot

while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.² That was said in **107 Duke Power Co. v. Greenwood County, 299 U.S. 259, 267, 57 S.Ct. 202, 205, 81 L.Ed. 178, *40 to be ‘the duty of the appellate court’. That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

14. We therefore ask that should mootness be found, the underlying Subject Order be vacated and the matter be remanded to the NLRB “with a direction to dismiss.” It is only in this manner we can be sure “the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.”

15. In sum, the Intervenor’s 11th hour disclaimer should not permit the NLRB to cite to the underlying decision, asserting (by way of example) that it was “vacated on other grounds.” That would permit exactly the prejudice Munsingwear sought to eliminate.

Conclusion


16. Based upon the above it is respectfully submitted that the mooting of the underlying order alone, would prove insufficient without “a direction to dismiss.” The NLRB cannot be permitted to cite to the underlying order,

which was never reviewed. It must be a nullity. If possible, we respectfully submit it should be removed from the NLRB official reporter, *See NTA Graphics, Inc.*, 316 NLRB 25, ft1 (1995), cited by the NLRB in its motion.

Wherefore, it is respectfully requested that should this Court deem the instant proceeding moot, the matter be remanded to the NLRB with a direction to vacate and dismiss the underlying order such that it is of no precedential value and, if possible remove the underlying order from any official NLRB reporter.


Richard M. Howard

Sworn to before me this 13th
Day of February, 2017


Notary Public.

SHARON M BROWN
Notary Public, State of New York
No. 01BR6195437
Qualified in Suffolk County
Commission Expires 12/20/2020